DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 00-0244
STATE WITHHOLDING TAX
For the 1996 Tax Year

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ISSUE

I. Withholding Tax Levies Against Taxpayer as Responsible Corporate Officer:

Authority: IC 6-3-4-8(g); IC 6-8.1-5-1(b); Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

Taxpayer protests the assessment of tax levies based upon the presumption that taxpayer, as corporate secretary-treasurer, functioned as a responsible officer for a now bankrupt corporation. The taxpayer maintains that during the relevant tax year of 1996, because he was not responsible for corporate decisions regarding payment of bills, payroll, or other financial matters, the taxpayer should not now be held liable for unpaid trust taxes.

STATEMENT OF FACTS

Taxpayer served as the secretary-treasurer of a now bankrupt corporation from approximately 1981 until October 1996. During that time, the taxpayer was responsible for maintenance, freight, and computer services. According to the taxpayer, between the years 1984 to 1988, the taxpayer shared duties for certain bookkeeping matters including payroll responsibilities. The taxpayer was relieved of those particular responsibilities during 1988 and 1989. Those responsibilities, together with all other corporate financial matters, were turned over to the corporation's comptroller in December 1992. Although unclear from the taxpayer's written submission, it would appear that during the intervening three years, corporate financial matters were in the hands of the corporate president. After 1992, the taxpayer was denied access to most corporate financial information. The taxpayer retained check-signing authority for one of the corporation's operational accounts until 1993 at which time that particular account was closed by the comptroller.

At no time during the taxpayer's employment, did taxpayer have authority to sign contracts, obtain financing, or make purchasing decisions. At no time during the taxpayer's employment, did taxpayer have authority to determine which creditors would be paid or which creditors would be given priority.

Taxpayer was a minority shareholder and served as the corporate secretary-treasurer until tendering his resignation in August of 1996 with the resignation taking effect on the day in which the corporation was acquired by a second business interest. That takeover was completed on August 27, 1996. Although his resignation as secretary-treasurer took effect on that day, taxpayer remained as an employee of the corporation retaining essentially the same responsibilities held before resigning as a corporate officer. At the time of the takeover, taxpayer agreed to tender his minority share of stocks in exchange for shares of stock in the acquiring corporation.

DISCUSSION

I. Withholding Tax Levies Against Taxpayer as Responsible Corporate Officer:

The taxpayer protests the imposition of the tax levies on the ground that he was not under a duty nor did he have the responsibility for assuring that the corporation's 1996 withholding taxes were paid.

Withholding taxes may be assessed against a responsible corporate officer under the provisions of IC 6-3-4-8(g) which states that "[i]n the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Under the provisions of IC 6-3-4-8(g), any individual can be held personally liable for unpaid withholding taxes if (1) he was an officer, employee or a member of the employer, and (2) he had a duty to remit taxes to the Department. Indiana Dept. of State Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995). In determining whether a taxpayer had the authority to see that withholding taxes were paid, the court will look at three relevant factors. The court will look to the person's position within the power structure of the corporation. Where that person is a high ranking officer within the corporate power structure, that officer is presumed to have had sufficient control over the company's finances to give rise to a duty to remit trust taxes. That presumption may be rebutted by a showing the officer did not in fact have such authority.

Second the court will look to the authority of the officer as established by the articles of incorporation, bylaws, or the officer's employment contract.

Third, the court will consider whether the person actually exercised control over the finances of the business including whether the person controlled the corporate bank account, signed corporate check and tax returns, or determined when and in what order to pay corporate creditors.

Under IC 6-8.1-5-1(b), the "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Therefore, as a shareholder and corporate officer until the date of his resignation in 1996, the taxpayer has the burden of demonstrating that he is not liable for payment of the unpaid trust taxes.

The taxpayer has met his burden of demonstrating that, while serving as corporate officer, he lacked the delegated, actual, or practical authority to see that corporate taxes were paid and, as a result, that taxpayer should not be held personally liable for unpaid trust taxes.

The evidence offered by the taxpayer persuasively characterizes the taxpayer as an employee, having specifically prescribed responsibilities, rather than as a corporate officer exercising expansive or discretionary responsibilities. The evidence demonstrates that, while taxpayer possessed certain payroll authority during the years from 1984 to 1998, what payroll authority taxpayer had was removed by 1989. The last apparent remnant of taxpayer's independent authority over corporate finances was removed in 1993 when the taxpayer's authority over an operational checking account was ended and the account closed.

The taxpayer has rebutted the presumption, predicated on his status as corporate officer, that he had authority over corporate finances such that taxpayer should be held liable for unremitted trust taxes. *See* Safayan, 654 N.E.2d at 273. Additionally, there is some evidence that taxpayer was specifically denied access to corporate financial records and to information regarding the status of the corporation's financial status.

Although the taxpayer has presented no evidence concerning the duties and responsibilities placed on the taxpayer by the corporation's bylaws and articles of incorporation, the evidence suggests that – whatever those specifically delegated responsibilities – the taxpayers actual authority over financial matters was carefully circumscribed. Whether actual, official, delegated, or implied there is no evidence to suggest that taxpayer was in a position – subsequent to 1993 – to assure that the corporation's trust taxes were paid in 1996.

FINDING

Taxpayer's protest is sustained.

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